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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re  
Toll Free Service Access Codes

October 25, 1995

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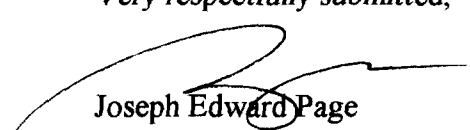
Honorable Commissioners:

Petitioner is grateful for having opportunity to address the Commission regarding proposed regulation. This Petition solicits action AGAINST implementing regulation which provides a right of first refusal to holders of "800" toll free numbers for their analogous "888" numbers.

The proposed regulation will: interfere and conflict with trademark law; reduce availability of toll free numbers; and be detrimental to public interest. More importantly, the proposed regulation will not "ensure", but rather, will *hinder* "efficient, fair and orderly allocation and use of limited numbering resources". This is in strict contrast to the stated purpose of the regulation set forth in NPRM, FCC 95-419, dated October 4, 1995.

The following detailed arguments present clear and convincing basis for the Commission to act against the pending rules. We encourage the Commission move for the greatest public good by refusing private interest requests for monopoly benefit which would result from promulgation of the proposed regulation.

Very respectfully submitted,

  
Joseph Edward Page

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

OCT 24 1995

In re  
Toll Free Service Access Codes

700 MAIL ROOM

Date: October 25, 1995

**PETITION TO REJECT PROPOSED REGULATION  
Relating to "right of first refusal" for toll free 888 numbers**

Honorable Commissioners:

The Commission is hereby solicited to act against regulation granting a right of first refusal for present holders of "800" toll free vanity-type numbers.

**COMMENT**

**I. Background:**

Upon petition from *Tansin A Dareos and Company* requesting immediate rulemaking, the Commission ordered Notice of Proposed Rulemaking FCC No. 95-419 be provided. That Notice solicits public comment directed to various issues relating to Toll Free Services Access Codes. In particular, comments to a proposed regulation which grants a right of first refusal to present holders of 800 vanity-type numbers. This petition and comment was prepared for and submitted to the Commission in response to their requests.

**II. Summary:**

Portions of pending regulation would grant to present holders of "800" toll free numbers their analogous "888" number. The regulation favors a small group of select individuals at great expense to the public in general. Authors of the regulation attempt to find justification under a theory of protection for intellectual property; this is analyzed below. While we appreciate the Commission's noble cause, we respectfully submit that Congress has amply provided for this very protection via Federal Trademark law.

Furthermore, the proposed regulation assures consumption of toll free numbers for the express purpose of preventing others use of them. These numbers will be "reserved" where their holders will not use them, nor will their competitors, nor anybody else.

Thousands of numbers will instantly become non-usable upon adoption of the proposed rules.

As it is the highest mandate of the Commission to act for the public good, it is imperative that the commission reject policy which promotes anti-competitive behavior and simultaneously consumes a limited public resource. In the very few cases where monopolies do benefit the public, arrangements for them have been made.

### **III. Argument:**

#### **Section I: Protection from Unfair Use of Names (Vanity Numbers) in Commerce**

Article 1, Section 8, Clause 8 of the United States Constitution provides basis for protection of intangible property. It allows Congress to grant "exclusive rights" (monopolies) for various sorts of intellectual property. Although monopolies and anti-competitive behavior are highly destructive to a market economy, the Constitution carefully provides limited monopolies to protect investment in certain circumstances. In all cases monopolies are granted, where entitled, only after extremely careful review of each matter.

Trademark law is a very well developed area of law which provides for the fair use of names in commerce. Many years of precedence provide well defined standards such as "confusingly similar". These standards are relied upon when determining if a monopoly is warranted. The Trademark Office has recognized hundreds of toll free vanity-type numbers and provides strong protection therefor.

However, by way of pending regulation, the FCC will extend and augment monopolies granted by Trademark law. The commission offers as motivation for enacting these regulations NPRM, Part IV, Section D, paragraph 1, subparagraph 35, which reads in part:

"Companies may have a financial interest in being able to **reserve** these equivalent vanity numbers because of their high visibility, **consumer recognition**, and the **confusion** that may ensue, for example, if one subscriber uses the toll free number "1-800-THE-CARD" and a competitor uses the toll free number "1-888-THE-CARD." Some 800 number holders may have **invested substantial resources** in advertising the number and establishing a **reputation** for it."(*Emphasis added*)

We encourage critical review of the above passage. The language used therein is precisely parallel to that associated with the basis for providing Trademark law. The pending regulation would pre-empt trademark law by providing monopolies where one may not be entitled trademark protection and by not providing monopolies when one is entitled trademark protection. However, it is expressly the purpose of trademark law to provide for fair use of names in commerce.

It is instructive to consider some examples of where the Commission's proposed regulation may conflict with U.S. Trademark law.

#### **EXAMPLE #1**

If the Trademark Office determines that "800 THE-CARD" is sufficiently distinct from "888 THE-CARD" for purposes of "confusion" as it may relate to use in commerce, they have a well developed system consisting of many case histories to accurately make

this determination, the FCC risks awarding a monopoly to the owners of “800 THE-CARD” where such monopoly is not supported by Trademark law and subsequently the Constitution.

Conversely, if the Commission promulgates regulation as stated “to protect the considerable business investment some have in their business”, then the Commission will be charged with protection of ALL encroachments which are equivalent. The fundamental legal principle *stare decices* assures equal protection and provides for “like cases to be treated alike”. Thus, those having similar investments in 800 numbers will need to be similarly protected.

#### EXAMPLE #2

“800 DOCTORS” may be confusingly similar to “800 DOCTORZ”. Will the FCC then grant a right of first refusal to the holder of the former number for the later? Surely, under the same premise relied upon above, the FCC will want to protect the substantial investment of the good folks at “800 DOCTORS”. The Commission’s plan fails to take into account many instances of the unfair competition they seek to prevent. The plan will not prevent identical undesirable behavior directed at the same bad result for certain variations of vanity numbers which do not involve the prevfix 888. Now, one might consider how did holders of “800 DOCTORS” previously protect themselves against the described activity? They very successfully relied upon Trademark law.

The new rules may unfairly **extend** the monopoly of 800 holders.

#### EXAMPLE #3

Certain activity may cause one to lose monopoly rights to use a name in commerce. Abuse of the name in a way which extends its scope is one instance. Engaging in such abuse, one might lose trademark protection. According to the proposed regulation, one can never lose their monopoly lock on a 800 and 888 combination, thereby tending to permit market activity considered abusive, unfair and anti-competitive. It is therefore conceivable that one will lose trademark protection yet maintain a very powerful monopoly via the FCC rules.

Beside the conflict with trademark law, additional considerations must be made. Providing for a body to determine which numbers are too similar to others for fair use and therefore who will be granted a right of first refusal may further tax limited FCC personel. In addition, the FCC may be required to maintain a classification system. In Paragraph 3, subparagraph (b) 44 a proposed classification system redundant to the trademark system is suggested. Will these categories cooperate? conflict? overlap? Is it prudent for the FCC to repeat the good efforts of the Trademark office which is in good working order? Does the FCC expect to run their own trademark office?

We recognize the reasoning offered that ownership of a trademark does not imply ownership of the underlying number. However, ownership of a trademark necessarily always provides exclusive use of the mark in commerce. If one legitimately obtains a trademark in the configuration of “800 XXX-XXXX” and the FCC grants that number to anybody other than that trademark owner, the owner of the mark would not be able to use it in commerce. In this way, the proposed FCC regulation could prevent some legitimate

trademark owner effective use of his mark thereby giving rise to a cause of action against the Commission.

## **Section II: Consumption of Numbers for the Purpose of Preventing Their Use**

Granting the right of first refusal will greatly decrease efficient distribution of toll free numbers. In addition, it will tend to exhaust a limited public resource. Consumption of numbers in this way will accelerate the need to generate another access code. Some numbers dispensed under the plan are earmarked for non-use. Holding both "800 DOCTORS" and "888 DOCTORS" will not provide increased call capacity to its owners. It will however increase expense thereto. Since the analogous numbers are to be used merely as a blocking tool where others are prevented from using them, and their owners do not use them, the numbers are rendered non-usable.

An extension of the problem occurs when the holders of "800 DOCTORS" wants to block in addition: "888 DOCTORS", "800 DOCTORZ", "800 DOKTORS", "800 DOKTORZ", "888 DOCTORZ", and "888 DOKTORZ", among others. For each number there may be a plurality of numbers which may be desirable to block. Multiplied by the number of present 800 holders the numbers dedicated to non-use may exceed the number being used!

This example shows convincingly that trademark law is better at preventing the unfair use that the FCC plan of offering a right of first refusal attempts to address.

## **IV. Conclusions:**

All proposals in Part IV, Section D, Paragraphs 3 (a) and (b) must be rejected.

Promulgation of regulation as proposed will create monopolies outside the scope provided in the United States Constitution. Attempts to protect the interests of holders of 800 vanity-type numbers will interfere, conflict with and overlap trademark law. Grant of a "right of first refusal" will tend consume a public resource at an accelerated rate solely for the purpose of preventing use thereof. Contrary to its stated goal, the regulation will not protect against unfair competition as many variations of vanity numbers do not involve the prefix 888.

## **V. Proposals:**

In order to maintain uniformity with Trademark law; and to prevent holding numbers in a condition of non-use; and to provide for fair, equitable and distribution of toll free numbers now and in the future, the commission is hereby solicited to adopt the following proposal:

888 numbers shall be distributed as they were previously distributed, on a "first-come, first served" basis, except in the case where demand is made for a number which corresponds to a Federally registered Trademark. If a person has met the requirements

which entitle him/her trademark protection, then the “888 XXX-XXXX”, or “877 XXX-XXXX”, or subsequent toll free access code, which corresponds to that mark shall be assigned to him for the period which the mark remains on the Federal Register. By adopting this proposal, the Commission not only maintains consistency in Federal Regulation, but also provides for the highest protection of public interests and fairness.